(1) Supreme Court, U.S.
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No. 07-617

In The
Supreme Court of the United States

WILLIAM PAONE AND JANICE PAONE,

Petitioners,

v.

HERITAGE PLANTATION OWNERS' ASSOCIATION, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of North Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 4 U.S.C.A. § 5, known as the Freedom to Display the American Flag Act of 2005, is a retroactive statute?

2. Whether the Freedom to Display the American Flag Act should have been applied on appeal by the South Carolina Supreme Court?

CORPORATE DISCLOSURE STATEMENT

Because no Petitioner is a corporation, no corporate disclosure statement is required under Supreme Court Rule 29.6.

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OPINION BELOW

Appeal from: *Heritage Plantation Owners' Association, Inc. v. Paone*, Unpublished Opinion No. 2006-UP-001 (S.C. App. 2006), cert. denied. (Exhibit A).

BASIS FOR JURISDICTION

Petitioners seek review of the South Carolina Supreme Court's denial of a Petition for Writ of Certiorari entered on March 8, 2007. More particularly, this Petition seeks review of a state court ruling and interpretation of a Federal Statute (4 U.S.C.A. § 5). This Court has jurisdiction over this matter pursuant to Article III, Section 2 of the Constitution of the United States.

STATUTE INVOLVED IN THIS ACTION

This action involves 4 U.S.C.A. § 5, known as the "Freedom to Display the American Flag Act of 2005". In particular, 4 U.S.C.A. § 5, Sec. 3, applies here and provides:

> A condominium association, cooperative association, or residential real estate management association *may not adopt or enforce any policy, or enter into any agreement, that would restrict or prevent a member of the association from displaying the flag of the United States on residential property within the association with respect to which such member has a separate ownership interest or a right to exclusive possession or use.*

In addition, this action involves 4 U.S.C.A. § 5, Sec. 4, which states:

> Nothing in this Act [this note] shall be considered to permit any display or use that is inconsistent with – "(2) any reasonable restriction pertaining to the time, place, or manner of displaying the flag of the United States necessary to protect a substantial interest of the condominium association, cooperative association, or residential real estate management association.

STATEMENT OF THE CASE

In 2000, William and Janice Paone (the "Paones") built a home in Respondents' community located in Pawleys Island, South Carolina. Respondents' Covenants require that all plans for construction, including landscaping, must be made in writing and submitted to and approved by Respondents' Architectural Review Board (ARB). The Covenants do not specifically address restrictions related to flags or flagpoles and the ARB allows homeowners to erect flagpoles; however, the ARB arbitrarily adopted and is enforcing a policy that restricts the location of flagpoles on residential lots.

The Paones erected a flagpole to solely fly the American Flag in the middle of their front yard. Respondents, through the ARB, informed the Paones that the location of the flagpole was not permitted and demanded that it be taken down. A dispute arose between the parties over whether the location of the flagpole had been reviewed and approved by the ARB.

Respondents then brought suit seeking an injunction against Petitioners that would prevent them from keeping the flag pole in its location in the middle of Petitioners' yard. Respondent also asked the court for attorney fees

and requested the court to impose fines related to Petitioners' violation of the covenants and restrictions. The case was tried by the Master-in-Equity in Georgetown County, South Carolina in August, 2003. The trial court ruled in favor of Respondents and granted judgment in the amount of $42,629.83 for fines and attorney fees. The Paones appealed to the South Carolina Court of Appeals, which affirmed the ruling of the trial Court on January 4, 2006. The Paones then Petitioned the South Carolina Supreme Court for a Writ of Certiorari in March of 2006. On July 24, 2006, during the pendency of the Petition to the South Carolina Supreme Court, President Bush signed into law the Freedom to Display the American Flag Act of 2005. 4 U.S.C.A. § 5. By letter to the court, as required by South Carolina Appellate Court Rules (Rule 208(b)(7), South Carolina Appellate Court Rules), Counsel for Petitioners informed the South Carolina Supreme Court of the new law and its application to the appeal. The letter stated in pertinent part:

> I am writing this letter pursuant to Rule 208(b)(7), SCACR, to inform the Court and opposing Counsel of pertinent and significant authority that has come to the attention of the Appellants and their Counsel. On or about July 24, 2006, President Bush signed into law an act known as "The Freedom to Display the American Flag Act of 2005" . . . The law is being cited as supplemental authority because, if the law is remedial, the above-referenced action could be affected in its entirety and the Court, or the court below, would have to determine if the underlying actions taken by Respondents were reasonable.

(Exhibit B).

The South Carolina Supreme Court denied Petitioners' Petition by Order dated March 8, 2007. (Exhibit C).

ARGUMENT

1. Whether the Freedom to Display the American Flag Act of 2005 is retroactive?

Petitioners seek review of a state court decision regarding an important question of federal law, which has not been settled or reviewed by any court. When the South Carolina Supreme Court denied the Petition for Writ of Certiorari it affirmed that the actions of Respondents did not violate the federal statute. The federal law in question is one of first impression and its application to the facts of this case and its interpretation in general is of national importance, especially in light of the injunction sought and obtained by Respondent, which operates to bar future conduct. Failure to review the facts in light of the newly enacted law would allow for a continuing violation of 4 U.S.C.A. § 5.

This Court must interpret the Congressional intent of the Act. The key question here is whether Congress meant for the Act to be retroactive. Historically this Court will apply statutes retroactively where the language of a law requires such application. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990).

4 U.S.C.A. § 5 states that an association "may not *adopt* or *enforce* a policy" that is unreasonable or that is not necessary to protect the substantial interest of the association. Analyzing the quoted portion of the Act is critical in the discussion of the question presented. The use of the word "adopt" indicates that associations cannot create policies in violation of the Act at any point after the

effective date of the law. Thus, that part of the Act is to be applied only prospectively. On the contrary, by including the word "enforce" Congress prohibited the exercising of policies already in place, which by restricting the display of the American Flag would violate the Act. It is the ban on enforcing such a restriction that makes the Act retroactive.

Based on the plain language of the Flag Act, it is a retroactive statute and must be applied here when Respondent is seeking to enforce its policy, which restricts the display of the American Flag, against Petitioners. Accordingly, this Court should issue the notice for a Writ of Certiorari to the South Carolina Supreme Court.

2. Whether the Freedom to Display the American Flag Act should have been applied on appeal?

The trial court upheld Respondents' policy of restricting the display of Petitioners' flag pole and granted Respondent's an injunction prohibiting Petitioners' display of the American Flag on their property. The Appellate Courts of South Carolina affirmed the trial court. During the pendency of the appeal, the Flag Act was enacted to prevent such restrictions and enforcement of such policies if unreasonable and not necessary to protect a substantial interest of the community. Where the controlling law has changed between the entering of the decision below and the consideration of the matter on appeal, it is settled that the case should be determined in the light of the current law, as it existed at the time of the appellate decision. 5 Am.Jur. 2d, § 729. In *Ziffrin v. U.S.*, 318 U.S. 73 (1945), this Court held that "[a] change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law." The South Carolina Supreme Court refused to apply the new law.

The holding of this Court in a situation such as the instant action was solidified in *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974): "a court is to apply the law in effect at the time it renders its decision . . . 'if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation.'" *Bradley* (quoting from *U.S. v. Schooner Peggy*, 1 Cranch 103 (1801).

This Court has also ruled that where a case involves injunctive relief applying an intervening law on appeal is required. *Texas Company v. Brown*, 258 U.S. 466 (1922) (holding that law passed after original judgment applied to case involving relief by injunction). The logic behind such a ruling is simple: An injunction, when granted, acts in the future. As such, a law that would change the result of an injunction should be applied when the enjoined party appeals from the original ruling.

When Respondent's action for injunction was tried by the trial court and ruled on by the South Carolina Court of Appeals the Flag Act was not in effect. The law became effective during the pendency of Petitioners' Petition for Writ of Certiorari to the South Carolina Supreme Court. Based on the law in effect when it denied Petitioners' Petition for Writ of Certiorari below, the South Carolina Supreme Court should have "recognize[d] such a change as may affect the result in the trial Court, by vacating and setting aside the judgment appealed from . . . in order that the cause may be remanded so that the trial Court may be free to act by dealing appropriately with the controversy in the light of the change of the law." *Marshall v. Richardson*, 125 S.E.2d 639 (S.C. 1962).

Because the action below sought an injunction that would prevent the future conduct of Petitioners and all members of the community, the South Carolina Supreme Court had a duty to review and apply the law in effect when it rendered its decision. The Flag Act does not allow for restrictions against displaying the American Flag that are unreasonable. It is necessary to remand this case to the South Carolina Supreme Court for findings of fact relative to the reasonableness of Respondent's policy because enforcement of the injunction, policy and judgment are in violation of the Flag Act.

CONCLUSION

For the reasons stated above, this case should be remanded to the South Carolina Supreme Court for a determination of whether Respondent's enforcement of its policy regarding the placement of Petitioners' flag violates the Flag Act as an unreasonable restriction that does not protect the substantial interest of the community.

Respectfully submitted,

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Counsel of Record

Attorney for Petitioners

June 6, 2007
Myrtle Beach, South Carolina

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Heritage Plantation Owners' Association, Inc.,
Respondents,

v.

William Paone and Janice Paone, Appellants.

Appeal From Georgetown County
Benjamin H. Culbertson, Master-in-Equity

Unpublished Opinion No. 2006-UP-001
Heard October 12, 2005 – Filed January 4, 2006

AFFIRMED

Mark Andrew Brunty, of Myrtle Beach,
for Appellants.

Richard M. Lovelace, Jr of Conway;
Robert Norris Hill, of Newberry,
for Respondents.

PER CURIAM: In this action to enforce restrictive covenants, William and Janice Paone appeal the master-in-equity's order requiring them to remove a flagpole and basketball goal from their property and pay Heritage

Plantation Owners' Association, Inc. $27,575.00 in fines and $15,054.83 in attorney's fees and costs. We affirm.

FACTS

The Paones began construction of their house in Heritage Plantation in late 1999 or early 2000. The Heritage Plantation Declaration of Covenants and Conditions and Restrictions requires owners to receive written approval by the Heritage Plantations' Architectural Review Board (ARB) for all construction, including landscaping. In addition to their house plans, the Paones submitted their landscaping and drainage plans to the ARB. Throughout the landscaping project, the ARB required numerous changes to the plans. At the Paones' direction, the ARB conferred with the Paones' general contractor, Bruce Carrell, who had built numerous homes in Heritage Plantation. On July 10, 2000, the ARB held a special meeting to consider the Paones' construction. In a letter sent that day, the ARB required several revisions to the landscaping plan. The Paones' landscaper claimed that on July 20, 2000, he submitted a revised landscaping plan for the meeting that was to be held that day. Those plans included a flagpole. The agenda and minutes of the ARB's July 20 meeting do not indicate that the Paones' landscaping was discussed at that meeting.

At the August 3, 2000 meeting, the ARB again considered the Paones' landscape plan. It approved the plan subject to completion of the installation of landscaping material on the exterior side of the north fence. After this meeting, members of the ARB noticed the flagpole and a portable basketball goal on the Paone property. The ARB sent Carrell a letter on August 24, 2000 advising him that

although flagpoles may be approved, the ARB must approve the location prior to installation. It stated the current flagpole location was not acceptable. The ARB also advised Carrell that portable basketball goals are not permitted and basketball goals must be permanently installed. It directed Carrell to re-submit plans showing the permanently installed basketball goal and the new location of the flagpole to the ARB for approval. In a letter dated September 5, 2000, Carrell replied that a revised landscape plan with the location of the flagpole was submitted to the ARB on July 20. It enclosed a copy of the plan. He also explained the Paones had purchased the basketball goal before they understood that only stationary goals were permitted. He asked that the basketball goal be approved since it would be screened by landscaping.

The ARB responded that prior to Carrell's letter of September 5, 2000, it had never received a landscaping plan indicating a flagpole installation and it had not approved such a plan. The ARB informed Carrell that it had eleven copies of plans for landscape, drainage, irrigation and re-submittals, but the only one showing a flagpole was the one Carrell submitted on September 5, 2000. It requested Carrell submit a site plan with an alternate location for the flagpole that is not directly in front of the home and is some distance from the street. In addition, the ARB did not approve the request for the basketball goal unless it received a letter verifying that the goal is permanently installed. The ARB cautioned that Carrell must submit both an alternate flagpole location and the basketball goal verification before the next ARB meeting on September 21, 2000 and that "[f]ailure to do so will cause

this property to be in violation of the Covenants and Guidelines and may incur fines."

The Paones' attorney subsequently wrote to the ARB maintaining that the landscaping plans showing the flagpole location were dropped off on July 20, 2000 and this was the plan that was approved on August 3, 2000. The attorney asserted the Paones had no plans for removal of the flagpole at that time.

The Heritage Plantation Owners' Association subsequently brought this action seeking an injunction requiring the removal of the flagpole and portable basketball goal, payment of cumulative fines for violation of the covenants of $25 a day, retroactive to January 1, 2001, and attorney's fees and costs. In their answer and counterclaim, the Paones asserted that they submitted landscapes to the ARB containing the flagpole and the ARB approved those plans. They requested a return of their $2,500.00 deposit, damages for their travel costs, lost wages, and emotional distress, and attorney's fees and cost.

The trial court ordered the Paones to immediately take down the flagpole and not re-erect it without written approval by the ARB. It also ordered the Paones to remove the portable basketball goal from view of anyone within Heritage Plantation other than themselves. Although the court found the flagpole and basketball goal were separate violations of the covenants, it imposed a single fine of $25.00 a day from August 15, 2000 through the date of the hearing, for a total of $27,575.00. It also awarded the Association $15,054.83 in attorney's fees and costs. The Paones filed a motion to alter or amend the judgment, which the trial court denied. This appeal followed.

STANDARD OF REVIEW

An action to enforce a restrictive covenant is in equity. *South Carolina Dep't of Natural Res. v. Town of McClellanville,* 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). In an appeal from an equitable action, tried by a special referee alone, the appellate court has jurisdiction to find facts in accordance with our own view of the preponderance of the evidence. *Id.* The court should not, however, disregard the findings of the special referee, who was in a better position to weigh the credibility of witnesses. *Tiger, Inc. v. Fisher Agro, Inc.,* 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1990).

LAW/ANALYSIS

I. Existence of violations

The Paones argue the facts of this case do not support the master's ruling because the evidence reveals the Paones' plan was submitted and approved. We disagree.

The Paones' landscape designer, Brad Ingram testified that after the ARB's letter of July 12, 2000 he created a revised landscaping plan. This plan included the flagpole. Ingram explained that normally he would deliver plans to the builder who would in turn submit the plans. In this instance, he received a call from the Paones' builder, Bruce Carrell on the morning of July 20 wanting to know if there was any way the plans could be submitted that day in order that they be considered at the ARB's meeting that evening. Ingram copied the plans himself at the sales office at Heritage Plantation and then delivered the plans to the receptionist at the owner's clubhouse by 11:30 a.m. The revised plans, however, were not considered at the ARB's meeting on July 20.

Art Kent, a member of the ARB during the time the Paones were constructing their home, claimed the ARB never saw the revised plans showing the flagpole location until Carrell's letter dated September 5, 2000. He asserted that the ARB went through all of its files and did not find the plans Ingram claimed to have delivered on the July 20. Kent averred the ARB had never lost any correspondence before when dealing with 350 homes. He explained that when the ARB approved the Paones' basic landscaping plan on August 3, 2000, it considered the written plans that had been submitted for the July 12, 2000 meeting and Carrell's oral agreement to make the changes required by the ARB.

Importantly, on August 8, 2000 Carrell submitted a request to add the basketball goal to the Paones' yard. The attached landscaping plan that showed the addition of the basketball goal did not include the flagpole. Soon after the controversy over the flagpole and basketball goal arose, Carrell wrote to the ARB distancing himself from the matter and instructing the ARB to work directly with Mr. Paone on these issues. In the letter, Carrell stated, "Neither the flagpole nor the basketball goal were part of our construction agreement, and we did not arrange for either to be installed." However, Carrell did note that he believed the ARB's letter of August 3, 2000 had approved the revised landscape plan Ingram claimed to have submitted on July 20, 2000, which showed the basketball goal.

This case revolves on the credibility of the Association's witnesses, who claimed the ARB never saw or approved landscaping plans showing the flagpole, and the Paones' witness Ingram, who claimed to have submitted the plans. We give deference to the master's factual findings because he had a better vantage point from which

to judge the witnesses' credibility. *See Patterson v. Goldsmith,* 292 S.C. 619, 626, 358 S.E.2d 163, 167 (Ct. App. 1987) ("[T]he conclusions of the master who observed the demeanor and appearance of the witnesses have peculiar value on questions of credibility of witnesses."). Giving such deference to the master, we find the ARB never considered or approved landscaping plans that showed a flagpole. Thus, the Paones violated the covenants by installing the flagpole without the ARB's approval.

Furthermore, the Paones acknowledged at oral argument they waived any argument concerning placement of the portable basketball goal on their property, which constituted a violation of the covenants. Accordingly, we find no error in the master's conclusion that the Association had established two violations of the covenants beginning at or about August 15, 2000.

II. Fines as a penalty

The Paones argue the amount of the fines awarded by the master was grossly disproportionate to any damage and is an unenforceable penalty. We find this issue is not properly before this court.

In their complaint, the Association asserted it was entitled to a cumulative fine totaling $25.00 a day. Thus, the Paones were aware that the Association was seeking a significant award of damages from the cumulative fines at the time of the hearing; yet the Paones failed to argue such that the fines were an unenforceable penalty until their motion to alter or amend. A party cannot raise an issue for the first time in a Rule 59(e) motion when the issue could have been raised at trial. *MailSource, LLC v. M.A. Bailey & Assoc. Inc.,* 356 S.C. 370, 588 S.E.2d 639

(Ct. App. 2003). Thus, this issue is not preserved for our review. *See Dixon v. Dixon,* 362 S.C. 388, 608 S.E.2d 849 (2005)(issue raised for first time in Rule 59, SCRCP, motion is not preserved for review).

III. Reasonableness of attorney's fees

The Paones argue the master erred by not addressing the *Jackson v. Speed*[1] factors when determining reasonable attorney's fees. They assert that the case must be remanded for a consideration of the attorney's fee request. We disagree.

There are six factors for the trial court to consider when determining an award of attorney's fees: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed,* 326 S.C. at 308, 486 S.E.2d at 760.

In his order the master held that the Association's attorney's itemized statement of fees and costs and an affidavit from another real estate attorney averring the fees and costs were reasonable and satisfied him "that all of the standards in the cannons of ethics with regard to attorney's fees and their reasonableness have been met in the examination and scrutiny of [the Association's attorney's] bill for services." The master awarded the Association $12,164.50 in attorney's fees and $2,890.00 in costs.

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[1] 326 S.C. 289, 486 S.E.2d 750 (1997).

Although the master did not list the factors he considered, the master did state he considered factors set out in the "cannons of ethics."

> The factors for determining the reasonableness of fees set forth in Rule 1.5 of the Rules of Professional Conduct, Rule 407, SCACR, include the same factors as those set forth in Jackson v. Speed.[2]

Thus, in considering the factors set forth in the Rule 1.5 of the Rules of Professional Conduct, the master considered the *Jackson v. Speed* factors as well as other factors. We find no abuse of discretion in the master's award of fees.

IV. Remedies

The Paones argue the covenants restrict the remedies to either imposition of fines or injunctive relief. We disagree.

As restrictive covenants are contractual in nature, the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. *Taylor v. Lindsey,* 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). The court in *Taylor* elucidated:

> The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even

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[2] We note that Rule 1.5 of the Rules of Professional Conduct applies to the reasonableness of fees between an attorney and client and not to the award of fees to an opposing party.

> to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written. It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property, subject, however, to the provision that this rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument.

Id. (internal quotations and citations omitted).

Article 11.04 of the Covenants, titled Enforcement, provides in part: "Failure to comply [with the covenants] shall be grounds for imposing fines, for suspending voting rights, or for instituting and action to recover sums due, for damages, and/or for injunctive relief. . . ." This section further provides: "Should Declarant or the Association employ legal counsel to enforce any of the foregoing, all costs incurred in connection with such enforcement, including court costs and reasonable attorneys' fees, shall be paid by the violating owner. . . . [I]t is hereby declared that any breach [of the covenants, bylaws or rule or regulations of the Association] may not adequately be compensated by recovery of damages, and that . . . the Association . . . , in addition to all other remedies, and not by way of limitation, may require and shall be entitled to the equitable remedies of specific performance and of injunction to restrain any such violation or breach or any threatened violation or breach."

Sections 10.03 and 10.04 also authorize the ARB to enjoin further construction and to require removal or

correction of any work already in place that does not comply with approved plans and specifications.

Considering the plain language of the Declaration, we find the Association clearly had the right to impose fines and then to bring an action to recover the sums due from the aggregated fines. In addition, Article 11.04 authorizes the Association to receive attorney's fees and costs from its enforcement action. Furthermore, this section provides "in addition to all other remedies" the Association is entitled to an injunction to restrain violations of the covenants. Accordingly, we find the master did not err in awarding the Association damages from the fines due and injunctive relief.

CONCLUSION

For the above reasons, the order of the master is

AFFIRMED.

ANDERSON, HUFF, and WILLIAMS, JJ., concur.

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	IN THE FIFTEENTH JUDICIAL CIRCUIT
	CIVIL ACTION NO: 01-CP-22-826

Heritage Plantation Owner's Association, Inc.,

Plaintiff,

vs.

William Paone and Janice Paone,

Defendants.

ORDER

(Filed Aug. 26, 2004)

This matter comes before me in a hearing which began at 10:03 a.m on Thursday, August 28, 2003 which concluded at 4:57 p.m. that same day, present and on behalf of Plaintiff was Richard M. Lovelace, Jr., Esquire. Defendants were represented by Mark A. Brunty, Esquire.

This is an action filed by Plaintiff which is the Owner's Association for Heritage Plaintiff against Defendants, although residents of Oak Ridge, New Jersey, and are the owners of Lot 723 Heritage Plantation, Phase 18, together with the improvements thereon.

This real property and whether two of its improvements/ fixtures were approved by the Heritage Plantation Architectural Review Board ("ARB") are at issue in this dispute, and, accordingly, I find this Court has jurisdiction over both of the parties and the subject matter.

Plaintiff's action is one for declaratory judgment and is an action to enforce the Restrictive Covenants by injunction and to collect fines and costs.

As to Plaintiff's Complaint, Defendants interposed an Answer and Counterclaim basically denying the allegations of the Complaint; asserting estoppel or a waiver; latches as affirmative as complete and/or affirmative defenses.

The Fourth Defense, essentially the Counterclaim alleges that, contrary to the contentions of Plaintiff, the landscape plans for Defendants' house were approved in writing by the Plaintiff's Architectural Review Board.

The two matters in contention are the location of a flag pole erected on the Defendants' premises and the presence of a portable basketball goal both of which Plaintiffs contend violate the Restrictive Covenants.

Defendants seek damages from Plaintiffs on their counterclaim, which include requests for the return of the $2,500.00 landscape fee which Defendants placed on deposit with the ARB, pending successful completion of the landscape plan and site improvements.

Having had the opportunity to observe the demeanor of the witnesses on the witness stand, and to take into consideration their possible bias and/or prejudice, and based upon the credibility of the witnesses and the admissible testimony, Defendants' admissions of fact, and the exhibits introduced at trial, I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Declaration of Covenants, Conditions and Restrictions for Heritage Plantation, together with the twelve (12) subsequent Amendments which are filed in the Office of the Clerk of Court for Georgetown County, South Carolina and were introduced into evidence as Plaintiff's Exhibit "A".

2. Subsequent to the filing of the Master Declaration of Covenants, Conditions and Restrictions for Heritage Plantation, there were also filed subsequent Amendments to include those which control Heritage Plantation, Phase 18.

3. Prior to Defendants' purchase and construction of the house on Lot 723 of Heritage Plantation, Phase 18, Defendants had previously bought another lot and constructed a house on that lot, and they were, therefore, familiar with the Master Declaration of Restrictive Covenants, which provides that all plans and specifications for any structure, improvement, or dwelling to be erected on any lot in Heritage Plantation shall require the prior written approval of the ARB of the property Owner's Association prior to the Commencement of any construction or development work.

4. The main focus of the ARB is the exterior of the home, the landscaping, any pools, sports equipment, fencing, mailboxes, etc. Even after the completion of construction, all additions/deletions to the exterior of the home and the lot upon which the home may have already been approved and erected all additions/deletions or changes must be submitted to the ARB for approval prior to the implemention of any change.

5. The ARB has full authority to disapprove any plan submitted to it for purely aesthetic reasons, even if a similar plan has been approved for another owner.

6. A $2,500.00 landscape deposit is required, along with other fees and deposits, before the ARB will even review a plan. The deposit is only considered for a refund when the homeowner requests it and an on-site inspection by the ARB determines the landscape was installed in accordance with the approved plan.

7. After the introduction of the Restrictive Covenants and all supplements into the record, the first witness, Art Kent, published Section 11.04 of the Covenants which I will quote verbatim below:

> "Each owner shall comply with the Bylaws and published rules and regulations of the Association adopted pursuant to this Declaration, as either of the same may be lawfully amended from time to time, and with the covenants, conditions, and restrictions set forth in this Declaration and in the deed or other instrument of conveyance of his Lot or Dwelling. Failure to comply shall be grounds for imposing fines, for suspending voting rights, or for instituting an action to recover sums due, for damages, and/or for injunctive relief of such actions to be maintained by the Declarant, the Board of Directors on behalf of the Association, or, in a proper case, by an aggrieved Owner. Such Declaration of the Association" – "Should the Declarant or the Association employ legal counsel to enforce any of the foregoing, all costs incurred in connection with such enforcement, including court costs and reasonable attorneys' fees, shall be paid by the violating

owner. Inasmuch as the enforcement of the provisions of the Declaration Bylaws, and the rules and regulations of the Association are essential for the effectuation of the general plan of the development contemplated hereby and for the protection of present and future Owners, it is hereby declared that any breach thereof may not adequately be compensated by recovery of damages, and the Declarant, the Association, or any aggrieved Owner, in addition to all other remedies, and not by way of limitation, may require and shall be entitled to equitable remedies of specific performance and of injunction to restrain any such violation or breach or any threatened violation or breach. No delay, failure, or omission, on the part of the Declarant, the Association, or any aggrieved Owner in exercising any right, power, or remedy herein provided shall be construed as an acquiescence therefore and shall be deemed" – "or shall be deemed a waiver of the right to enforce such right, power, or remedy thereafter as to the same violation or breach, or as to a violation or breach occurring prior to subsequent thereto, and shall not bar or affect its enforcement. No right of action shall accrue nor shall any action be brought or maintained by anyone against the Declarant or Association for or on account of any failure to bring action on account of any violation or breach, threatened violation or breach, by any person of the provisions of the Declaration, Bylaws, or any rules and regulations of the Association, however long continued."

8. Mr. Kent was a member of the ARB from 1999 to 2001 and he, together with Carole Stiglin were the ARB members assigned to Defendants' property at the inception of the building process and worked jointly on the case.

9. The initial construction of Defendants' house began in late 1999 or early 2000.

10. During the course of construction, both Mr. Kent and Ms. Stiglin had communicated with both Defendant Mr. Paone and his builder, Bruce Carrell, about a number of problems that had arisen regarding the Paone's proposed plans at a conference call between the Paones and the builder had resulted in the Paone's making the changes required by the ARB.

11. On or about August 15, 2000, Defendants erected a flag pole on the premises without first submitting a landscape plan or other specifications, including the same and did so without obtaining the approval of the ARB.

12. On or about August 24, 2000 the ARB notified Defendants that the location of the flagpole was unacceptable and unapproved and that a new landscape plan would need to be submitted demonstrating the flagpole in a new location.

13. Defendant's refused multiple requests by the Plaintiff to relocate the flagpole to a more suitable site, and the Defendants continue to adopt the position taken by their general contractor, Bruce Carrell, Plaintiff's Exhibit 14, which asserted that a revised landscape plan with the location of the flagpole was submitted to the ARB on July 20, 2000 at the Owner's Club House; however, the Owner's Association denies every having received any submission on behalf of Defendants which showed or depicted any flagpole at all.

Defendants applied for approval of a portable basketball goal, which was denied.

14. More than 370 homes have been completed successfully at Heritage Plantation without any controversy, and without any allegations or difficulties with regard to lost plans or correspondence, and I find the ARB never approved the erection of the flagpole at its present location.

15. Interesting enough, Plaintiff's Exhibit 19 admitted into evidence which is a letter from the general contractor Carrell Homes to the ARB dated November 22, 2000 which states in pertinent part, "Thank you for your letter of September 21, 2000, we will respond to all items you have addressed. The flagpole and basketball goal (previous correspondence). "We request the ARB work directly with Mr. Paone on these cases." "Neither the flagpole nor the basketball goal were part of our construction agreement, and we did not arrange for either to be installed." This is very telling in terms of what I see as the general contractor disassociating himself with his clients', the Defendants' violation of the Covenants. The Defendants cannot have it both ways, that is not to say Defendants cannot take the position they submitted plans through Mr. Carrell and Mr. Carrell's landscaper showing and depicting the flagpole, which was approved by ARB, and at the same time, state unequivocally that neither the flagpole nor the basketball goal were any part of the scope of work in which the general contractor and, in turn, his landscaper were involved.

16. Defendants' admissions pursuant to Plaintiff's Request for Admissions admit that on or before August 24, 2000, Defendants requested permission to place a portable basketball goal on the property, and Defendants were informed by the ARB that based on the longstanding policy by the ARB, that only permanently installed basketball goals would be permitted. Nonetheless, and in

addition to the erection of the flagpole without permission, Defendants then also erected a portable basketball goal on the premises without submitting a landscape plan or other specification depicting the goal and without obtaining the ARB's preapproval.

17. It is the firm and longstanding policy of the ARB only permanent basketball goals shall be approved for use on the premises.

18. Defendant William Paone attended the hearing but did not testify.

19. Defendant Janice Paone did not attend the hearing.

20. Defendants' primary witness and advocate at the hearing was Bruce Carrell, the builder, and Defendants' only other witness was Brad Ingram, the landscaper.

21. Both the builder and the landscaper having together built and landscaped many homes within Heritage Plantation to the complete satisfaction of the ARB, knew or should have known the placement of the proposed placement of the flagpole required prior submission and prior approval by the Architectural Review Board.

22. The installation of the flagpole was apparently done by a third party contractor because both the general contractor and the landscaper denied having erected the flagpole in its present location. The testimony made it clear that the issue in contention with the ARB was not a flag or flagpole, as the ARB has approved many flagpoles in Heritage Plantation which fly the American Flag and/or other banners. However, the testimony was clear the ARB has never approved placement of any flagpole, directly in front of the door and on a circular driveway.

23. It is uncontradicted that after Defendants moved into their home, a portable basketball goal was placed on the property without ARB approval.

24. Shortly thereafter, the Homeowner's Association Compliance Committee, as well as the ARB began sending letters to Defendants requesting/requiring the portable basketball goal be removed.

25. Defendants then submitted a plan to the ARB for a basketball goal which was approved, contingent on the installation of the goal in the ground, where sited, in accordance with the proposed site plan, and with surrounding landscape, and so that the portable nature of the basketball goal was to be eliminated.

26. The ARB has never approved a portable basketball goal for a homeowner and has, historically, required many to be removed.

27. Defendants' basketball goal is in clear view on the property, and is stored in an area clearly visible from the street.

28. The records of the ARB reflect that the ARB never received any landscape plans from the Paones other than those in its file and none of the plans in the file ever showed or placed a flagpole or basketball goal on the property.

29. The only correspondence received by the ARB showing a flagpole on the property was sent to the ARB by the general contractor, Bruce Carrell in September 2002, which was subsequent to the installation of the flagpole again, without prior approval of the ARB.

30. As of the date of trial, Defendants have not only failed to move the flagpole to an alternate site, approved by the ARB, but they have also failed and refused to remove or move the portable basketball goal on the premises.

31. The Master Declaration allows the Heritage Plantation Owners Association to impose fees for a violation at the rate of $25.00 per day pursuant to Section 1104 of the Declarations, but notwithstanding the right and ability of Plaintiff to impose fines, Defendants' willful and continuous violation of the covenants, conditions and restrictions have caused and continue to cause irreparable harm to the Plaintiff for which there is no adequate legal remedy.

32. The violations of covenants by Defendants have been blatant and conspicuous and testimony of Plaintiffs' witnesses satisfied me that the violations have been continuous.

33. I find that there were two violation, the erection of the flagpole without authority from the ARB prior to its erection which violation continued through the date of the hearing and thereto the erection without removal of the portable basketball goal, I find that the two violations began at or about August 15, 2000.

34. Notwithstanding the two violations of the restrictive covenants as set forth above, I find that a fine of $25.00 per day should be assessed against the Defendants from August 15, 2000, to the date of the hearing, for an aggregate fine of $27,575.00

35. I find that the only evidence in the record in support of Defendants' counterclaim relates to the

$2,500.00 landscaping deposit. The testimony at the hearing was that as soon as the flagpole was put in the proper location and the portable basketball goal removed from site that the $2,500.00 would be returned to Defendants. Inasmuch as Defendants have, had exclusive control of the return of their $2,500.00 deposit, pending only their compliance with the requirements of the ARB, but have chosen not to comply, Plaintiffs have in no way damaged Defendants by the retention of his deposit, and Defendants will and shall have his $2,500.00 returned to him if and when he complies with the proper mandates of the ARB with regard to the flagpole and the basketball goal.

~~36. I will convene a supplemental hearing after the issuance of this Order, to determine if the violations have continued since the day of the hearing and I will award supplemental fines, if any consistent with the testimony as to whether or not, or to what extent the violations have continued subsequent to the hearing.~~ [/s/ BHC]

37. I have asked counsel for Plaintiffs to submit an itemized statement of attorney's fees, court costs and expenses through the date of this Order, and I have had submitted to me a Affidavit from not only counsel for Plaintiff with regard to his attorney's fees but also from Otis Alen Jeffcoat, III, a highly regarded real estate attorney with more than thirty years of experience in real property developments and homeowners associations which satisfies me that all of the standards set forth in the cannons of ethics with regard to attorney's fees and their reasonableness have been met in the examination and scrutiny of Mr. Lovelace's bill for services.

38. I find Plaintiffs are entitled to judgment against the defendants for attorneys fees and costs incurred by the Plaintiffs in this case. Plaintiffs have incurred attorney fees in the amount of $12,164.50 and costs of $2,890.33, entitling Plaintiffs to a total award of $15,054.83.

CONCLUSIONS OF LAW

I conclude that it is appropriate to issue an injunction or, better, mandamus ordering the Defendants to immediately take down the flagpole as it was located on the date of the trial of this case. Further, such flagpole shall not be re-erected by the Defendants without written approval by the ARB authorizing the Defendants' erection of the flagpole at such designated location as the ARB deems appropriate, if any.

I further conclude that the Defendants should immediately remove the portable basketball goal from the view of anyone, other than the Defendants, within Heritage Plantation.

I further conclude that a fine of $25.00 per day should be assessed against the Defendants for the two violations of the Declarations from August 15, 2000, to the date of the trial of this case, for a total fine of $27,575.00

I further conclude that the Plaintiffs are entitled to attorney fees and costs from the Defendants totaling $15,054.83.

NOW THEREFORE, based upon the above findings of fact and conclusions of law, it is hereby

ORDERED that the Defendants immediately take down the flagpole as it was located on Defendants' property on the date of the trial of this case; it is further

ORDERED that such flagpole shall not be re-erected by the Defendants without written approval by the ARB authorizing the Defendants' erection of the flagpole at such designated location as the ARB deems appropriate, if any; it is further

ORDERED that the Defendants immediately remove the portable basketball goal from the view of anyone, other than the Defendants, within Heritage Plantation; it is further

ORDERED that judgment is rendered against the Defendants and in favor of the Plaintiffs for $27,575.00 in fines for violation of the Declarations, plus attorney fees and costs totaling $15,054.83, for a total judgment of $42,629.83 in favor of the Plaintiffs against the Defendants.

AND IT IS SO ORDERED.

/s/ Benjamin H. Culbertson
Benjamin H. Culbertson
Master-In-Equity for
Georgetown County, S.C.

August 23, 2004
Georgetown, South Carolina

[SEAL]

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 28211

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

(803) 734-1080
FAX (803) 734-1499

March 8, 2007

Mark Andrew Brunty, Esquire
Mark A. Brunty, PA
7600 Brentwood Dr.
Myrtle Beach, SC 29572

Re: Heritage Plantation v. Paone, William
2001-CP-22-00826

Dear Counsel:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari Denied.

s/ Jean H. Toal C.J.
For the Court
Justice John H. Waller, Jr.,
not participating

March 8, 2007."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

/s/ Daniel Richstad
CLERK

DES/dmh

cc: Robert A. Muckenfuss, Esquire
Richard M. Lovelace, Jr., Esquire
Robert Norris Hill, Esquire
The Honorable Alma Y. White
The Honorable Kenneth A. Richstad

Mark A. Brunty, P.A.

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The Honorable Daniel E. Shearouse
Clerk of the Supreme Court
1231 Gervais St.
Columbia, SC 29201

Re: Heritage Plantation Owners' Association, Inc., Respondents vs. William Paone and Janice Paone, Appellants
Case No.: 01-CP-22-826

Dear Mr. Shearouse:

I am writing this letter pursuant to Rule 208(b)(7), SCACR, to inform the Court and opposing Counsel of pertinent and significant authority that has come to the attention of the Appellants and their Counsel. On or about July 24, 2006, President Bush signed into law an act known as "The Freedom to Display the American Flag Act of 2005". The law is currently cited as Public Law 109-243. A copy of the law is enclosed for your review. The law is being cited as supplemental authority because, if the law is remedial, the above-referenced action could be affected in its entirety and the Court, or the court below, would have to determine if the underlying actions taken by Respondents were reasonable. The law applies to the entirety of the underlying action and this appeal, therefore, reference to a particular page of the Brief or issue is unnecessary.

Regards,

Mark A. Brunty

cc: Richard Lovelace esquire
Robert N. Hill, esquire